

P.E.R.C. NO. 88-43

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

POLICE OFFICERS BENEVOLENT  
ASSOCIATION,

Respondent,

-and-

Docket No. CI-87-45-123

WILLIE HOWARD RAWLINGS,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority delegated by the full Commission and in the absence of exceptions, dismisses a Complaint, based on an unfair practice charge filed by Willie Howard Rawlings against the Police Officers Benevolent Association. The charge alleged the Association violated the New Jersey Employer-Employee Relations Act when it did not notify him of a pending disciplinary hearing where Rawlings did not appear and was found guilty. The Chairman, in agreement with a Commission Hearing Examiner, finds that the Association informed Rawlings of his right to appeal an adverse disciplinary determination and offered to assist him, but that Rawlings did not respond.

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Appearances:

For the Respondent, Schneider, Cohen, Solomon, Leder & Montalbano, Esqs. (David Solomon, of counsel)

For the Charging Party, Willie Howard Rawlings, pro se

DECISION AND ORDER

On January 9 and February 17, 1987, Willie Howard Rawlings filed an unfair practice charge and amended charge, respectively, against the Police Officers Benevolent Association ("Association"), the majority representative of Jersey City police officers. The charge, as amended, alleges the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (2), (3), (4) and (5),<sup>1/</sup>

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<sup>1/</sup> These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the

when it did not notify him of a pending disciplinary hearing where Rawlings did not appear and was found guilty.

On March 24, 1987, a Complaint and Notice of Hearing issued. On April 3, the Association filed its Answer. It denies that a hearing was held without Rawlings being present and denies violating the Act.

On September 10, 1987, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. Rawlings filed a post-hearing brief.

On October 8, 1987, the Hearing Examiner recommended the Complaint be dismissed. H.E. No. 88-17, 13 NJPER \_\_\_\_ (¶ \_\_\_\_ 1987). He found that the Association did not breach its duty of fair representation to Rawlings. Specifically, he found that the Association informed Rawlings of his right to appeal an adverse disciplinary determination to Civil Service and offered to assist him, but that Rawlings did not respond to this offer.

The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before October 22, 1987. Neither party filed exceptions or requested an extension of time.

1/ Footnote continued from previous page

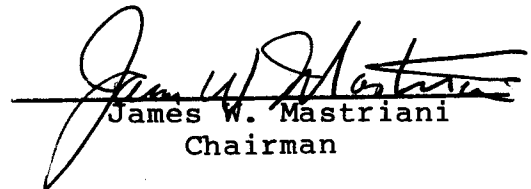
adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (5) Violating any of the rules and regulations established by the commission."

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7) are accurate. I adopt and incorporate them here. Under all the circumstances of this case, and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt his recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

DATED: Trenton, New Jersey  
November 3, 1987

H.E. NO. 88-17

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

POLICE OFFICERS BENEVOLENT  
ASSOCIATION,

Respondent,

-and-

Docket No. CI-87-45-123

WILLIE HOWARD RAWLINGS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent POBA did not violate §§5.4(b)(1)-(5) of the New Jersey Employer-Employee Relations Act when Rawlings failed to respond to the efforts of the POBA to prosecute a Civil Service appeal on his behalf, following an adverse departmental ruling in which Rawlings was penalized six days' vacation. The testimony of Rawlings plainly did not meet the preponderance of evidence standard that the POBA violated its duty of fair representation under a legion of decisions of both the courts and the Commission.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-17

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Charging Party.

Appearances:

For the Respondent  
Schneider. Cohen, Solomon, Leder & Montalbano, Esqs.  
(David Solomon, Esq.)

For the Charging Party  
Willie Howard Rawlings, pro se

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on January 9, 1987, and amended on February 17, 1987, by Willie Howard Rawlings (hereinafter the "Charging Party" or "Rawlings") alleging that the Police Officers Benevolent Association (hereinafter the "Respondent" or the "POBA") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that Rawlings was brought up on several departmental charges as to which

a hearing was held, which he "lost"; Rawlings alleges that he was never notified of the date to "rehear the charges," and that he learned from another fellow officer that he had lost the hearing because he did not appear; Rawlings alleges further that he wanted his case to go to arbitration but the Respondent is known for its discrimination against black officers and that this is the third time the Respondent "has violated my filing grievances"; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) through (5) of the Act.<sup>1/</sup>

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 24, 1987. Pursuant to the Complaint and Notice of Hearing, a hearing was held on September 10, 1987,<sup>2/</sup> in Newark, New Jersey, at which time the parties were given an opportunity to examine

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<sup>1/</sup> These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (5) Violating any of the rules and regulations established by the commission."

<sup>2/</sup> This matter was rescheduled several times from the initial hearing date of April 30, 1987, in order to accommodate the availability and convenience of the parties.

witnesses, present relevant evidence and argue orally. Both parties argued orally and the Charging Party only requested the opportunity to file a post-hearing brief to be postmarked no later than September 28, 1987.<sup>3/</sup>

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the parties and the post-hearing brief of the Charging Party, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Police Officers Benevolent Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2. Willie Howard Rawlings is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Rawlings, who is employed at the car pound of the Jersey City Police Department, has during the course of his employment been the subject of several disciplinary actions, which have resulted in departmental hearings within the Jersey City Police

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<sup>3/</sup> The Hearing Examiner received a post-hearing brief from Rawlings on September 29, 1987, which was postmarked September 28, 1987.



Department. Counsel for the Respondent has represented the POBA at various departmental hearings, among which have been those involving Rawlings.

4. Although the evidence is less than clear as to precisely when Rawlings had his last departmental hearing, which is the subject of the instant Unfair Practice Charge, as amended, it appears that it was in November or very early December 1986. Rawlings acknowledged that he received a statement of charges from the Police Department, which resulted in this departmental hearing. Rawlings was represented at this hearing by the POBA through its counsel. The decision of the hearing officer for the Police Department was that Rawlings was guilty as charged and the penalty was the loss of six days of vacation. Because the penalty was in excess of five days it was necessary for a Civil Service appeal to be taken by Rawlings.

5. On December 3, 1986, counsel for the POBA addressed a letter to its President, Larry Doyle, in which Doyle was advised that Rawlings had called the office of counsel on December 2, 1986, and that he wished to appeal the discipline imposed upon him, supra (R-1). Counsel stated in R-1 that he was not in his office when Rawlings called and thus did not speak to him personally. Counsel pointed out that a Civil Service appeal must be made within 20 days. Counsel for the POBA concluded in R-1 that the Respondent should meet with Rawlings in order to determine what course of action should be taken. A copy of R-1 was sent to Rawlings and Rawlings acknowledged receiving it.

6. Rawlings testified that he never received any communication from the POBA after receiving a copy of R-1, supra. Notwithstanding that the next event following the departmental hearing would have had to have been an appeal through the Civil Service procedures, Rawlings insisted that sometime in April 1987 or May 1987 he learned that an appeal hearing had been held, of which he claimed he had no knowledge, and that because of this fact he did not appear and, thus, "lost the hearing." Rawlings testified that he learned of the foregoing by the accidental interception by a fellow officer of a telephone call to his place of employment.

7. Rawlings testified on direct and cross-examination that he never made any effort regarding the foregoing telephone call, which reported the outcome of his hearing, in order to find out when the hearing was held, who was present, and precisely what happened.

8. Vincent Adler, an aide to the POBA President, testified credibly that he tried to set up a meeting with Rawlings to determine whether an appeal should be taken following R-1. Adler testified that he made several telephone calls to the car pound where Rawlings worked, and to his home, and left messages. Specifically, he left messages with a police officer Johnston and

William Gasser at the car pound. Rawlings never responded and, thus, no Civil Service appeal was ever taken.<sup>4/</sup>

9. Adler testified that the POBA has filed many appeals to Civil Service. The procedure is that if an individual employee wants to file an appeal and the POBA decides it has merit, then the POBA will represent the employee on the appeal. Otherwise, the individual employee can pursue the appeal on his own and engage his own attorney without objection by the POBA. Finally, Adler testified that the POBA has represented Rawlings in the past in connection with the various departmental hearings in which Rawlings has been involved, and that Rawlings has never made any complaint to the POBA regarding its representation of him. Also, Adler testified that Rawlings has never taken any Civil Service appeals from any of his departmental hearings or their results.

10. William Gasser, a police officer in the car pound with whom Rawlings works, testified unequivocally that in December 1986, Adler called him and asked for Rawlings and when Rawlings was not there Adler stated "please have him call the POBA office" (Tr 50). Gasser testified that he wrote a message to this effect for Rawlings on a scrap of paper with the POBA phone number and put it in

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<sup>4/</sup> Adler explained the use of the telephone to reach aggrieved parties as opposed to the use of the mail. He testified that when he is able to speak to an aggrieved party over the telephone he has a better opportunity to make sure that all of the ramifications are understood. Typically, when people receive letters they either do not respond or they claim that they did not receive them, etc.

Rawlings' mail slot in the office on the top of the file cabinet where about nine employees in the car pound have mail slots (Tr 50, 51).

#### DISCUSSION AND ANALYSIS

Even though Rawlings has alleged that the POBA violated §§5.4(b)(1)-(5) of the Act, it is apparent that the only subsection herein involved is §5.4(b)(1), which implicates the breach of the duty of fair representation, i.e., the allegation that the POBA did not represent Rawlings at departmental hearings or appeals from adverse departmental decisions.

In adjudicating alleged breaches of the duty of fair representation, the courts of this State and the Commission have consistently embraced the standards established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E..C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd. Ap. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (June 16, 1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). The Court in Vaca held that

...a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. 386 U.S. at 190.

In fact, the U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation:

...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).<sup>5/</sup>

It is abundantly clear to the Hearing Examiner that Rawlings has not proven by a preponderance of the evidence that POBA breached its duty of fair representation under the legal authorities set forth above. Vaca speaks in terms of arbitrary, discriminatory or bad faith conduct on the part of a union representative. Lockridge speaks further in terms of conduct that intentional, severe and unrelated to legitimate union objectives. The NLRB adds that proof of "mere negligence," standing alone, does not suffice to prove a breach of the duty of fair representation.

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<sup>5/</sup> See, also, Bergen Community College Adult Learning Center, H.E. No. 86-19, 12 NJPER 42 (¶17016 1985), aff'd P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985).

Vaca also holds that the decision to refuse to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. See also, New Jersey Turnpike Employees Union Local 194, supra.

Any fair reading of the allegations made by Rawlings and the proofs provided by him at the hearing, together with the counter-proofs of the POBA, makes clear that the POBA did not in any way violate its duty of fair representation under the decisions of the Courts and the Commission. It is clear from R-1 that the POBA stood ready to provide Rawlings with assistance in a Civil Service appeal from the Police Department's imposition of the loss of six days' vacation (see Finding of Fact No. 4, supra). Counsel for the POBA in R-1 made clear that such an appeal was necessary and suggested a meeting with Rawlings to determine his wishes. A copy of R-1 was sent to Rawlings.

Vincent Adler, an aide to the POBA President, testified credibly that he tried to set up a meeting with Rawlings and made several telephone calls in an effort to reach him (see Finding of Fact No. 8, supra). Rawlings never responded, notwithstanding that adequate opportunity was given him to do so, and, thus, no Civil Service appeal was ever taken (see Findings of Fact Nos. 4-10, supra).

It appears to the Hearing Examiner that Rawlings was his own worst enemy, in not having responded to the several efforts of Adler to reach him, as a result of which a Civil Service appeal

might have been undertaken on his behalf. Adler's explanation as to why he used the telephone rather than the mail to reach individuals whose services might be needed was persuasive. There is no indication in the record that the POBA had ever done other than afford Rawlings the facilities of its counsel and its assistance in Civil Service appeals (see Finding of Fact No. 9, supra).

Whatever problems Rawlings has had in appeals from adverse departmental hearings by the Jersey City Police Department, it appears clear to the Hearing Examiner that the POBA has not in any way been an obstacle but, rather, has offered its assistance in prosecuting any appeals that might have been undertaken on behalf of Rawlings or other similarly situated police officers in the Police Department. Thus, the Hearing Examiner must recommend that the Complaint of Rawlings be dismissed in its entirety.

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Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent POBA did not violate N.J.S.A. 34:13A-5.4(b)(1)-(5) in connection with its actions vis-a-vis Willie Howard Rawlings following an adverse departmental ruling of the Jersey City Police Department in or around November or December 1986.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



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Alan R. Howe  
Hearing Examiner

Dated: October 8, 1987  
Trenton, New Jersey